# In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 864

GABRIEL MCMILLAN, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (R. 209–212; Pet. App. 22–24) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on November 15, 1966 (R. 213; Pet. App. 21). The petition for a writ of certiorari was filed on December 14, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the district court properly refused to give an instruction on entrapment.



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2. Whether petitioner was precluded from showing entrapment by the court's rulings during the cross-examination of a government witness and a government informer.

3. Whether evidence seized incident to petitioner's arrest without a warrant was admissible.

## STATEMENT

After a trial by jury in the United States District Court for the Southern District of New York petitioner was convicted of two illegal sales of narcotics on March 8 and 11, 1965, and of concealment of narcotics on April 6, 1965 (R. 4–6, 186–187). He was given concurrent sentences of imprisonment for seven years (R. 205–206). On appeal the conviction was affirmed (R. 207–208, 213).

The evidence showed that on March 8, 1965, Lokey Allen, who operated a candy store at 500 West 146th Street in New York City, introduced agent Cook to petitioner as a friend, and told petitioner that they had $500 for some cocaine. When petitioner said he could take care of them, Cook gave $500 to Allen, who handed it to petitioner (R. 22). Petitioner then left. About midnight he delivered to Allen a tinfoil package, later found to contain cocaine hydrochloride, which Allen turned over to Cook (R. 23–26, 95). On March 11, 1965, Cook and Allen made another $500 purchase from petitioner, who promised that the "coke" would be better than last time (R. 26–29, 44, 95–96).

On April 6, 1965, Allen told narcotic agent Frost (who had surveilled the prior sales) that petitioner

had asked Allen to get an adulterant for some cocaine (R. 72–73). Frost had Allen telephone petitioner's apartment to ascertain that he was there (R. 73). After Frost had stationed agents in the vicinity of the apartment, Frost instructed Allen to telephone petitioner and tell him that he (Allen) had the adulterant available and that petitioner should come for it immediately (R. 73–74). At about 7:45 p.m., as petitioner started to leave his apartment, the officers identified themselves as federal agents and placed him under arrest (R. 74, 85). Petitioner dropped one tinfoil package containing cocaine hydrochloride on the floor. Two similar packages were taken in a search of his coat pocket (R. 74, 85, 89–90, 96–97). During a search of the apartment the agents seized from a top bureau drawer in the bedroom a plastic bag containing two ounces of cocaine (R. 75, 90–91, 97–98).

Allen was called by defense counsel who was allowed to examine him as a hostile witness (R. 134–135). Allen testified that he had known petitioner about two years (R. 130), and had talked with him about narcotics prior to March 8 (R. 135–136). He had been informed that petitioner had narcotics and that he should make purchases from petitioner. Sometimes petitioner contacted Allen to say that he had narcotics (R. 139, 148).

## ARGUMENT

1. The trial court denied petitioner's request for an instruction on entrapment, finding that no evidence had been presented to raise such an issue (R. 159–161). As the court of appeals found, this ruling was

fully justified on the record in this case. Not only did petitioner willingly sell narcotics to the agent on March 8 and March 11, but the testimony of Allen shows that petitioner had willingly sold to the informant before that time. Allen testified that he approached petitioner after being informed that petitioner had narcotics; that petitioner made sales to Allen before March 8; and that sometimes petitioner himself told Allen that he had narcotics. None of this evidence was refuted. Moreover, the possession of cocaine on April 6 (the basis of count 5, which alone would support the sentence) obviously was not the product of any encouragement by the government. There was therefore no error in failing to give an instruction on entrapment. *United States* v. *Place,* 263 F. 2d 627, 629 (C.A. 2), certiorari denied, 360 U.S. 920; *United States* v. *Berry,* 362 F. 2d 756, 758 (C.A. 2); *United States* v. *Gosser,* 339 F. 2d 102, 109 (C.A. 6), certiorari denied, 382 U.S. 819.

2. The trial court did not, as petitioner contends (Pet. 11–17), preclude petitioner from showing entrapment by rulings on questions put to agent Cook and Allen by defense counsel. A reading of the record shows that counsel was allowed wide latitude on cross-examination. For example, counsel was allowed to ask agent Cook whether he knew if the informant "bothered the life" out of petitioner before March 8. However, after the agent had answered in the negative, the judge properly sustained other questions introduced by "You would not know * * *" (R. 32–33). Typical of the difficulty the court had with defense

counsel's questions is the colloquy which occurred after defense counsel asked whether the plan was to have petitioner come to the candy store for the purpose of enticing him into the sale of narcotics. The court said (R. 36):

> No, I will sustain an objection. I want you to understand the nature of why I am sustaining this objection. These words of art that you are using, words like "enticing, induced," and so forth, you can go into any subject matter that I consider legitimate, but questions of that nature, in my judgment, are not proper.
>
> Mr. LOWENBERG [petitioner's counsel]. I have the Sherman case, Judge——
>
> The COURT. That is not the case. The point is that the choice of language is not proper. You may reframe your question into what I consider to be the proper language.

Similarly, a reading of the examination of Allen (R. 133–155) shows that petitioner was not precluded from bringing out the facts, although the court did sustain objections to repetitious or conclusory questions. Petitioner particularly complains that the court sustained an objection to the question, "Knowing he was in the business of buying dresses and selling dresses and so on, nevertheless you spoke to him about narcotics, did you not" (R. 154). This came after Allen had been extensively examined as to his dealings with petitioner with respect to narcotics (R. 136–137), the nature of his first dealings with petitioner (R. 139), and the fact that petitioner had bought various items from Allen, including dresses (R. 153–154). Nothing

in Allen's answers, however, supported the assumption that Allen knew petitioner was in the business of buying and selling dresses. The question was improperly phrased and the court correctly sustained an objection. By so doing, it did not preclude a defense of entrapment.

3. A motion to suppress the narcotics seized from petitioner's person and from his apartment at the time of his arrest was properly denied. There was probable cause for the arrest without a warrant, since the agents knew at about 4:30 p.m. on April 6, 1965, that petitioner was seeking an adulterant for narcotics then in his possession. They were justified in believing they would have to act quickly before the supply could be distributed. As noted by the court of appeals, narcotics agents have specific statutory authority to arrest without a warrant on probable cause. 26 U.S.C. 7607. See *Wong Sun* v. *United States,* 371 U.S. 471, 478, fn. 6; *Draper* v. *United States,* 358 U.S. 307. The search incidental to the lawful arrest was also proper. *United States* v. *Rabinowitz,* 339 U.S. 56, 63–64; *Harris* v. *United States,* 331 U.S. 145, 150–151.

When the agents searched petitioner's apartment on April 6, a woman who was present said that she lived there (R. 74, 93). On the basis of this statement, petitioner argued, for the first time in the court of appeals, that it was error to attribute to him possession of the cocaine found in a plastic bag in the bedroom. The seizure of contraband narcotics uncovered during the lawful search of petitioner's apart-

ment would have been proper even if they had not belonged to petitioner, and there was therefore no reason to suppress the evidence. The jury was entitled to conclude that the narcotics were petitioner's, not only because the apartment was his, but because other narcotics were found on his person, and because the evidence showed him to be a dealer in narcotics. In any event, the narcotics found on petitioner's person would alone support the conviction on count 5.

## CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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